IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 173 of 1990

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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UMAR ABDUL HABIB & 1 - Appellant(s)
Versus
GUJARAT ELECTRICITY BOARD & 1 - Defendant(s)

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Appearance :
MR MEHUL S SHAH for Appellant(s) : 1 - 2.
NOTICE SERVED for Defendant(s) : 1 - 2.
MR PREMAL R JOSHI for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 15/12/2006

ORAL JUDGMENT

1. Mr.Mehul S.Shah, learned counsel for the appellants and Mr.Premal R. Joshi, learned counsel for the respondents.

2. Heard.

3. The appeal has been admitted for hearing the parties on the following substantial questions of law;

   (i) Whether this suit of the plaintiffs is barred by the provisions of Order 23 Rule 1(4) of the Civil Procedure Code is not maintainable?

   (ii) Whether there is bar of estopple to the plaintiffs against questioning the legality and validity of the bill?

   (iii) Whether it is legally open to the Lower Court to take up new points in appeal about maintainability of the suit and about bar of estopple?

4. Mr.Shah, learned counsel for the appellants submits that the present suit was filed by the appellant No.1 – Umarbhai Abdulbhai Habib, as consumer of the electricity and the plaintiff No.2 - Bai Sarbai Kalanbhai, as occupier of the premises. According to him, certain notices were issued to the appellant No.1 for making recovery and for taking appropriate actions against him. According to him, the appellant No.2 Bai Sarabhai Kalabhai had earlier filed

Civil Suit challenging the legality and validity of the bill and demand made by it, according to him, the said suit was unconditionally withdrawn and thereafter, the present suit was filed by both the plaintiffs. He submits that the plaintiffs had prayed to the Court that the bill be held to be invalid and a direction be given to the respondent Board to refund the money which was illegally recovered by the Board from the plaintiff No.2. The defendants appeared in the said suit and submitted that the bill was in accordance with law, the earlier judgment would operate as res-judicata, by making payment, the plaintiff has acquiesced to the bill and they also raised various other pleadings. The learned trial court framed number of issues, the question relating to res-judicata, acquiescence and estopple were not pressed by the defendants. The trial court ultimately decreed the suit. The defendants, being aggrieved by the said judgment and decree, took up the matter in appeal. The appellate court framed a point for determination that whether in view of the provisions contained in Sub-Rule (4) of Rule 1 of Order XXIII of the Code of Civil Procedure, in view of the withdrawal of the earlier suit filed by the plaintiff No.2, the suit on hand was maintainable or not.

After hearing the parties, the appellate court held that the suit at the instance of parties was not maintainable in view of unconditional withdrawal of the first suit. Without entering into the merits of the matter, the appellate court allowed the appeal and dismissed the suit. Being aggrieved by the said judgment and decree, the plaintiffs are before this Court.

5. Mr.Shah, learned counsel for the appellants submits that the first appellate court should not have taken up the issue of Rule 1 of Order 23, specially when a plea was not raised by the other side and no issue was framed by the trial court. His further submission is that assuming that no relief could be granted in favour of the appellant No.2 who had instituted the earlier suit as an occupier of the place where the connection has been granted, the suit at the instance of the appellant No.1 in whose name the connection has been granted, would still be maintainable because all the proceedings are being drawn against the appellant No.1 including the proceedings for recovery etc.

6. Mr.Joshi, learned counsel for the respondents submits that the question relating to withdrawal of the earlier suit was a pure question of law and the appellate court certainly could look into the maintainability of the suit. He

also submits that the suit at the instance of the appellant No.2 was not maintainable and as the plaint shows that the appellant No.1 holds the connection in his name and the appellant No.2 is occupying the premises, the appellant No.2 was required to be joined as party, the suit was rightly dismissed.

7. Mr.Shah, learned counsel for the appellants submits that even if the suit at the instance of the appellant No.2 was not maintainable, in view of the notices issued to the appellant No.1, he could always maintain the suit. He, however, admits that the suit at the instance of the appellant No.2 would not be maintainable and no relief can be granted in favour of the appellant No.2.

8. Sub-Rule (4) of Rule 1 of Order XXIII provides that at any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim. Sub-Rule (4) says that where the plaintiff abandons any suit or part of claim under Sub-Rule (1) of Rule 1 of Order XXIII or withdraws from a suit or part of a claim without the permission referred to in Sub-Rule (3) of Rule 1 of Order XXIII, he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject

matter or such part of the claim. Undisputedly, the plaintiff No.2 had filed the earlier suit seeking a declaration that the bill issued against his interest is illegal, however, lateron he withdrew from the suit. Undisputedly, she did not ask for any permission from the court, nor did she reserve any liberty in her favour to file yet another suit on the same cause of action, if that be so, the suit at the instance of the plaintiff No.2 seeking a declaration that the bill is invalid or bad would not be maintainable. No relief can be granted in favour of the plaintiff No.2, even a relief for refund of the money also could not be granted.

9. So far as the plaintiff No.1 is concerned, according to Mr.Shah, connection stands in his name and all proceedings for recovery etc. are to be taken against him and under the circumstances, he would certainly be entitled to maintain the suit.

10. It is not in dispute before me that the appellant No.1 was not a party to the earlier suit. If that is the true factual position, then bar of Sub-Rule (4) of Rule 1 of Order XXIII would not operate against the plaintiff No.1. It is also to be seen that the plaintiff is not entering into the litigation either as representative of the plaintiff No.2 or successor

of the plaintiff No.2. The plaintiff No.1 has filed the suit in his personal capacity to avoid illegal recovery.

11. The suit at the instance of the plaintiff No.1 would be maintainable and the court below, in the opinion of this Court, committed an illegality in dismissing the suit of the plaintiff No.1. The judgment and decree passed by the learned first appellate court are set aside with the following directions;

(i) The name of the appellant No.2 / plaintiff No.2 would be deleted and no prayer made on behalf of the plaintiff No.2 would be granted in her favour including the relief for refund of the money which she had already paid to the respondents.

(ii) The matter is remanded to the first appellate court with a direction to the parties to appear before the said court on 15/1/2007. The learned first appellate court shall rehear the parties and decide the matter in accordance with law. It is, however, made clear that the first appellate court shall not grant any decree in favour of the plaintiff No.2 even for refund of the money and that part of the decree granted by the trial court directing refund in favour of the plaintiff No.2 shall become nonest.

12.The appeal is allowed to the extent indicated above. No costs. A decree be framed accordingly.

(R.S. GARG, J.)

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